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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

ANK M. McKEY, AS TRUSTEE IN BANKRUPTCY OF GRIGSBY-GRUNOW COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

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MANUFACTURERS' FINANCE COMPANY,
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FRANK M. McKEY, AS TRUSTEE IN BANKRUPTCY OF GRIGSBY-GRUNOW COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

THE ISSUE INVOLVED.

Within 35 days from the date of receivership (R. 45) and before the present issue was tried in the District Court, the receivers paid to the finance company, from the proceeds of the assigned accounts, sums sufficient to extinguish its claim for advances to Grigsby-Grunow Company and full contract interest at the rate of 20 per cent per annum, to the date of receivership. There was never any question of the receivers' willingness to make such payments, from proceeds of the assigned accounts, and in addition to pay 7 per cent interest for the 35 days after the date of receivership. (Findings of Fact, par. 3, R. 74.)

The issue then and now is whether the receivers were obliged to pay, from the proceeds of assigned accounts,

more than 7 per cent interest for the 35 days after the date of receivership. The finance company asserted interest from date of receivership at an average rate of 28-3/10 per cent per annum. (R. 65.) The difference in money between 7 per cent and 28-3/10 per cent was $3,306.55. (R. 65.)

Upon trial of this issue, the District Court allowed 7 per cent. The court denied the claim for attorney's fees asserted in the amount of $7,800. (Findings of Fact, R. 73; Opinion, R. 70; Decree, R. 75.) The Circuit Court of Appeals affirmed the decree. (72 F. (2d) 471: R. 93.)

The theory of the finance company's claim is that it was a secured creditor,[1] and that the accounts receivable assigned were sufficient to pay the average rate of 28-3/10 per cent interest after receivership, to which average rate it contends the contract (R. 46) entitles it.

The finance company was a secured creditor in a peculiar sense. While accounts receivable had been assigned to it, the finance company at no time gave, or sought to give, notices of the assignments to the debtors of the accounts. (Findings of Fact, par. 2, R. 74; Opinion, R. 71.) The receivers had the full responsibility of conservation and collection of the accounts. In carrying out this re-

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[1] In so stating the theory of the finance company, we should qualify by saying that its brief describes the contract in terms of a sale of accounts and not in terms of a loan with the accounts as collateral.

Such a contract in recent years has always been construed as a loan with the accounts as collateral. *Home Bond Co.* v. *McChesney*, 239 U. S. 568; *Mercantile Trust Co.* v. *Kastor*, 273 Ill. 332; *Dorothy* v. *Commonwealth Co.* 278 Ill. 629; *General Motors Acceptance Corporation* v. *Mid-West Chevrolet Co.* 66 F. (2d) 1 (C. C. A. 10, 1933), extensive note, p. 4; *Tennessee Finance Co.* v. *Thompson*, 278 Fed. 597 (C. C. A. 6, 1922); *Commercial Security Co.* v. *Holcombe*, 262 Fed. 657 (C. C. A. 5, 1920); *National Discount Co.* v. *Evans*, 272 Fed. 570 (C. C. A. 6, 1921); *LeSueur* v. *Manufacturers' Finance Co.* 285 Fed. 490 (C. C. A. 6, 1922); *National Trust & Credit Co.* v. *F. H. Orcutt & Son Co.* 259 Fed. 830 (C. C. A. 7, 1919).

Throughout the brief we refer to the transaction as a loan with collateral.

sponsibility, under the orders of court, the receivers expended considerable sums in advertising, allowances, credits, etc., and by their efforts and by such expenditures were enabled to create a fund sufficient to pay the finance company. (Findings of Fact, par. 4, R. 74; also R. 24-5, 71.) In the intervening petition, no offer was made to share in any part the expense of creation of this fund. (R. 13-16.) Instead, there is asserted claim for interest at an average rate of 28-3/10 per cent after date of receivership.

Some part of the period of 35 days was attributable to appraisal of the validity of the assignments, to audits, to notice to parties to the record and in obtaining orders of court, the money collected meanwhile reposing securely in a special bank account. (Findings of Fact, par. 3, R. 74.) Each order for payment was upon the receivers' own motion. (R. 67-8.) There was no unreasonable delay, but some delay is inherent in receivership administration.

For the period after date of the receivership the finance company demanded an interest rate, which commenced at 20 per cent and, as payments were made, arbitrarily rose in rate, until the rate actually exceeded 250 per cent, averaging for the period, 28-3/10 per cent. No such arbitrary fluctuation in rate was ever asserted against Grigsby-Grunow Company. (Findings of Fact, par. 1, R. 73-4.)

The finance company asked attorney's fees in the District Court of $7,800 (R. 29), though the maximum sum in dispute was $3,306.55. (R. 65.)

Such prayers for relief, asserted by the intervening petitioner, were considered inequitable, and the court allowed but 7 per cent interest after receivership, which had been admitted by the receivers.

These facts are so inadequately stated in the finance company's brief that we shall append a further statement of the case.

Further Statement of the Case.

The average rate of 28-3/10 per cent per annum.

We quote paragraph 1 of the Findings of Facts, to which no error is assigned:

"1. By written contract, on or about October 5, 1933, the Grigsby-Grunow Company agreed to pay to intervening petitioner for cash advances to it, interest at the rate of 10 per cent per annum, not upon the balance of cash advances remaining from time to time, but upon the aggregate amount of accounts receivable and trade acceptances assigned by the Grigsby-Grunow Company to the intervening petitioner as security for said advances. Prior to November 24, 1933, the date of the receivership, it was the practice of the Grigsby-Grunow Company and of the intervening petitioner to make adjustments from time to time so that the outstanding balances of cash advances at all times amounted to approximately one-half of the aggregate amount of accounts receivable and trade acceptances remaining assigned as security for said advances. The interest rate, therefore, prior to November 24, 1933 amounted to approximately 20 per cent per annum upon the outstanding balance of cash advances. Beginning November 24, 1933, the intervening petitioner no longer made such adjustments so as to maintain the outstanding balances of cash advances at one-half of the aggregate amount of accounts receivable and trade acceptances assigned, and applied literally the provisions of the contract which permitted the charging of interest at the rate of 10 per cent per annum upon the aggregate amount of accounts receivable and trade acceptances remaining assigned, notwithstanding the reduction from time to time in the outstanding balances of cash advances. As a result thereof, as payments were made after the receivership, the interest rate of 20 per cent, which was the effect of the provision of the contract, rose sharply so that the average interest rate, so provided, after November 24, 1933 amounted to approximately 28-3/10 per cent per annum, the interest rate for the last few days, before final payment of the principal of advances, amounting to in excess of 250 per cent per annum." (R. 73-4.)

Under orders of court, obtained upon the receivers' own motion (R. 67-8), the receivers paid to the finance company

(R. 45): $140,000 on December 14, 1933; $36,159.30 on December 22, 1933, and $10,003.18 on December 29, 1933.

The finance company itself had collected $83,538.30 upon trade acceptances which duly endorsed had been delivered to it by Grigsby-Grunow Company as additional security (R. 44-45).

$140,000
83,538.30
36,159.30
10,003.18

$269,700.78

Thus was paid to the finance company (R. 45) its total outstanding advances to Grigsby-Grunow Company, with 20 per cent interest (the contract rate) to date of receivership.

November 24, 1933 to December 14, 1933, the rate of interest asserted (related to outstanding balance of advances) was 20 per cent. December 14, 1933 to December 22, 1933, the rate asserted (related to outstanding balance of advances) rose sharply because the remaining security was more than twice the balance of advances, and interest was computed not upon balance of advances but upon face amount of security. December 22, 1933 to December 29, 1933, the rate, computable from the above figures and related to the balance of advances, to wit: $10,003.18, was approximately 290 per cent per annum. To be conservative, the final rate was stated as "over 250 per cent."

No claim for such sky-rocketing interest was made by the finance company against Grigsby-Grunow Company, the other party to the contract. (Findings of Fact, par. 1, R. 73; R. 63.)

The Fund Created by the Receivers.

We have referred to the difference between the present case and the usual case of a secured creditor, whose security is so reduced to possession as to be within his own control.

Here, the finance company at no time gave, or sought to give, notices of the assignments to the debtors of the accounts.

We quote paragraph 2 of the Findings of Fact, to which no error is assigned:

> "2. No notices to the debtors of the assigned accounts or trade acceptances were given by the intervening petitioner prior to the date of the receivership and no such notices were given subsequent to the date of the receivership, except as to a small portion of such amounts constituting part of the trade acceptances, and no application was made by intervening petitioner to give such notices, except as to such part." (R. 74.)

We further quote from the opinion of the District Court:

> "In this case, and so far as the opportunities of this court for observation has extended in other cases, loan companies which make their loans by means of the method of purchasing accounts, uniformly refrain from giving notice prior to receivership or bankruptcy, to the debtors of the assignment. It is said that they so refrain because if they did not so refrain they would alienate all of their customers; and, so far as the court's observation has extended, they refrain from giving notice to debtors of the assignment after receivership or after bankruptcy for the reason, as has been said, that the debtors are more likely to pay if they remain in ignorance of the assignment." (R. 71.)

The District Court said (R. 71): "the receivers have in this case gone to extraordinary efforts to maintain the integrity of the business of the defendant and to preserve the accounts receivable, including the pledged accounts, as live and valuable assets."

Under orders of the court, the receivers proceeded aggressively to conserve and to collect the accounts receivable.

The assigned accounts were owed largely by so-called distributors (R. 25), who purchased radios, tubes, and refrigerators and in turn sold to wholesalers and retailers. The receivership tended "to freeze" these accounts and for a week or ten days collections were small. (R. 24.) To induce the distributors to pay, to enable them to pay, and to avoid litigation over set-offs, it was necessary to assist the distributors in "moving" their merchandise, and it was necessary to reduce prices on certain items (R. 24) and to take back some merchandise. (R. 24.) To assist in "moving" their merchandise the receivers expended $35,000 in local advertising. (R. 24-5, 71, 74.) The receivers also held distributors' meetings in New York and Chicago (R. 24-25), and performed other special services particularly in connection with one of the assigned accounts which was $100,000 in amount. (R. 64.)

Few, if any, of these acts done to stimulate collections could possibly have been performed by the finance company.

Whatever, if anything, more may have been accomplished by these efforts and by this considerable expense, the receivers thereby were able to create a fund sufficient to pay off the finance company.

Delays in Payment Inherent in Receivership Administration.

From the first day of the receivership, all sums received in payment of assigned accounts were deposited in a special bank account. (Findings of Fact, par. 3, R. 74.)

The receivers had at least legal title to the money re-

ceived. It was obviously necessary for them to examine the assignments, to determine their validity, to obtain an audit of the daily transactions which preceded the receivership, to ascertain and to obtain an accounting of collections by the finance company from the trade acceptances which indeed were not mentioned in the intervening petition (R. 13-16), to give notices to parties of record and to obtain appropriate orders.

When the order of December 20, 1933 was entered, the accounting of collections upon the trade acceptances, information in the exclusive possession of the finance company, was apparently not at hand. (Order, par. 1, R. 68.)

A delay of 35 days in settling, except as to interest after receivership, this sizable claim for preference does not appear to have been unreasonable. Receivership administration rarely moves so fast.

Attorney's Fees.

The only evidence upon the claim for attorney's fees was furnished by the finance company's witness, Seymour M. Lewis, who testified that 16 days had been devoted to the matter (R. 26), and by the finance company's expert witness, Michael Gesas, who placed a value upon such services of $7,800. (R. 29.)

We quote from the Findings of Fact, paragraph 5:

> "No evidence was introduced as to the amount of reasonable attorney's fees, if any, for counsel for intervening petitioner, for services necessarily rendered herein." (R. 75.)

The court's opinion stated:

> "Perhaps the court should say further, concerning the claim for attorney's fees, that the court cannot see any reason for the intervening petitioner having obligated itself for attorney's fees in any considerable

> amount. There has never been any doubt at any time but that, to the extent that the proceeds of the pledged accounts would become available, the principal of intervening petitioner's debt and contract interest thereon to date of the appointment of the receivers and legal interest thereon thereafter, would be paid." (R. 72.)

The willingness of the receivers so to pay had at all times been made clear to the finance company. (R. 28; Findings of Fact, par. 3, R. 74.)

ARGUMENT.

The Purported Conflict Between Circuits.

Before discussing the unusual facts of the present case which led both courts below to term the demands unconscionable, we refer briefly to the decisions in the various Circuit Courts of Appeals, with reference solely to interest after date of receivership in cases involving assignments of accounts receivable.

In the present case, both the District Court and the Circuit Court of Appeals for the Seventh Circuit (72 F. (2d) 471) recognized and gave effect to the right of the finance company to its principal of advances, full contract interest to date of receivership, and 7 per cent interest thereafter until the principal was fully paid.

In *Merchants & Manufacturers Securities Co.* v. *Johnson*, 69 F. (2d) 940 (C. C. A. 8, 1934), a decision almost contemporaneous with the present Seventh Circuit case but neither case citing the other, the Circuit Court of Appeals for the Eighth Circuit reached precisely the same result. The Eighth Circuit case allowed full principal, contract interest to the date of receivership, and 6 per cent interest thereafter.

Since this identity of decision is ignored in the opposing brief, though the brief relies upon the Eighth Circuit case, we quote, from page 946, the reversal order in that case:

> "The judgment appealed from is reversed, and the cause is remanded to the lower court, with directions to enter decree in favor of the appellant for the sum of $32,489.01, with interest thereon from December 21, 1931 (the date of receivership), at the rate of 6 per cent, dismissing appellee's (the receiver's) counterclaims on the merits, and adjudging that the decree for the recovery of said amount shall constitute a special

> lien upon all of said accounts receivable still unpaid to the appellant and upon the proceeds of same in the hands of the appellee, * * *"

The result in the Eighth Circuit case was more disadvantageous to the finance company than in the present case, since the period after date of receivership in the Eighth Circuit case was almost 2½ years and completion of payment of the principal was still in the future, whereas in the present case the finance company was paid within 35 days.

A case in the Second Circuit, *In re International Raw Material Corporation*, 22 F. (2d) 920 (C. C. A. 2, 1927) is cited in support of the finance company's present contention. The opinion does not appear to discuss interest after receivership.

It is true that a later case in the Second Circuit, *In re Gotham Can Co.*, 48 F. (2d) 540 (C. C. A. 2, 1931) does allow under the facts of that case full contract interest after receivership.

In the *Gotham Can Co.* case, however, out of the total collections of $8,685.73 upon assigned accounts, $8,156.21 (being over 94 per cent of total collections) was collected by the finance company independently of the receiver and obviously after giving notices of the assignments to the debtors of the accounts. The balance of $529.52 (being less than 6 per cent of total collections) was collected by the receiver. It seems clear that the finance company assumed the burden of caring for and liquidating the accounts, and that the small residue merely came in to the receiver from debtors who did not understand or trust a notice of assignment.

Our opponents repeatedly attack the case of *In re Chicago Reed & Furniture Company*, 7 F. (2d), 885, (C. C. A. 7, 1925).

The following language in that case is pertinent to the present case, quoting from page 885 of that opinion:

> "To what extent, if at all, this has enabled corporations lawfully to bind themselves to pay interest on loans at rates beyond the theretofore statutory maximum has not to our knowledge been decided by the Illinois courts. But in our view of the case this question is not of necessity here involved. The later statute may or may not have repealed pro tanto the usury law of the state, *but it did not abrogate the rule that courts of equity will not lend their aid to enforce contracts which upon their face are so manifestly harsh and oppressive as to shock the conscience.* 39 Cyc. 891." (Italics ours.)

Since the date of that decision, the statute was construed by the Supreme Court of Illinois to provide that corporations could agree to pay interest in excess of the statutory rate, but the above italicized words of the opinion were not thereby affected.

Our opponents in their argument press that decision much fnrther than it was used in the present case, for in the present case the same court affirmed the District Court decree which had conceded the right to full contract interest prior to date of the receivership. The issue in the present case is confined to interest after receivership.

We shall discuss the above quotation further in a later subdivision of this brief.

We shall also discuss later the case of *LeSueur* v. *Manufacturers' Finance Co.*, 285 Fed. 490 (C. C. A. 6, 1922), in which the Circuit Court of Appeals for the Sixth Circuit charged the reasonable expenses of collection against a fund, collected by a creditors' committee of the borrowing corporation in liquidation of accounts assigned to the finance company.

The Position of the Finance Company Is That It Can Place Upon the Receivers the Large Expense of Conservation and Collection of the Accounts and, Without Contribution Thereto, Can in Equity Even Charge the Receivers 28-3/10 Per Cent Interest for the Period During Which the Receivers Were Creating the Fund to Pay the Finance Company.

We have stated hereinbefore the actual services rendered by the receivers and the large expense incurred in making the accounts collectible and in collecting them. These duties, which they performed under court orders, were placed upon them, so far as respects the assigned accounts, because the finance company at no time gave, or sought to give, notices of the assignments to the debtors of the accounts. The finance company was powerless, by action through collection agencies or otherwise, to accomplish with the distributors what the operating receivers were able to accomplish. The court in its opinion clearly recognized this situation. (R. 71.) See also the prayer of intervening petition. (R. 16.)

The fund in the special bank account was created by the receivers unassisted. Perhaps it was unjust to the general creditors to go so far as the receivers went. Certainly it would be unjust to the general creditors to recognize the propriety of a payment of 28-3/10 per cent interest, after this expense of conservation and collection of the assigned accounts.

In *Preston Nat. Bank of Detroit* v. *Emerson, et al.*, 102 Mich. 462, 60 N. W. 981 (1894), receivers of the corporation were called upon to collect accounts which had been assigned by the corporation as security. The decree of the trial court, denying that the fund could be impinged upon for receivers' expense, was reversed by the Supreme Court of Michigan with the following comment (N. W. page 983):

"The expense incurred in collecting has been done

> under the express decree of this court, and it is inequitable that the receivers should go without compensation, or that they should be paid out of funds which should go to unsecured creditors."

In *LeSueur* v. *Manufacturers Finance Co.* 285 Fed. 490 (C. C. A. 6, 1922), the present petitioner was confronted with a liquidation of its assigned accounts. There, as here, it did not assume the burden of conservation and liquidation of the accounts but permitted a liquidating committee to be formed for the distressed corporation, which endeavored to collect the assigned accounts and was partially successful. A substantial sum was deducted by order of court from the proceeds of the pledged accounts to represent the cost of collections. We quote from the opinion (p. 500):

> "Assuming that the committee had power to agree to pay the expenses out of general assets, provided there remained sufficient to pay general creditors in full, not only is it open to serious doubt whether the committee had power to make such agreement as against general creditors of an insolvent estate (especially in view of the terms of the stockholders' assignment to the committee), but in our opinion to impose such liability would be inequitable as against general creditors."

Other cases dealing with contribution and apportionment of receivership expenses as between funds allocable to different classes of claimants, are: *Pennsylvania Co. for Ins. on Lives* v. *Jacksonville, etc., R. Co.* 66 Fed. 421 (C. C. A. 5); *American Pig Iron Storage Warrant Co.* v. *German,* 126 Ala. 194, 28 So. 603; *Central Trust Co.* v. *Chester County Electric Co.* 9 Del. Ch. 247, 80 Atl. 801; *Fagan Iron Works* v. *Calumet Construction Co.* 82 N. J. E. 345, 88 Atl. 1069; *Cannon* v. *Snipes,* 32 Wash. 243, 73 Pac. 379.

Anticipating this point, the opposing brief refers to an allegation in a pleading in the underlying proceeding in which the receivers were appointed, that the assets exceed the liabilities by $13,000,000. Unfortunately this case does

not offer possibility of paying general creditors in full. There was adjudication in bankruptcy March 10, 1934 (R. 91). In receiverships, initial allowances cannot proceed upon the optimistic assumption that all claims of every class will be paid in full. *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry.* 233 U. S. 261, 266-7.

Courts Do Not Favor Provisions of a Contract Creating a Penalty, Particularly When That Penalty Is Directed Not Toward the Party to the Contract But Toward the Assets of an Estate in Receivership or Bankruptcy.

The claim for sky-rocketing of interest, at the most, is assertion of a penalty because a receiver was appointed. (Opposing brief, p. 3, footnote.) It is thus an attempt to profit unfairly at the expense of assets in receivership or bankruptcy administration.

In *Kothe, Trustee* v. *R. C. Taylor Trust,* 280 U. S. 224, a somewhat similar penalty in a lease was unenforcible in bankruptcy, the court saying, at p. 226:

> "The parties were consciously undertaking to contract for payment to be made out of the assets of a bankrupt estate—not for something which the lessee personally would be required to discharge. He, therefore, had little, if any, immediate concern with the amount of the claim to be presented; most probably, that would affect only those entitled to share in the proceeds of property beyond his control.
>
> The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration. Any agreement which tends to defeat that beneficient design must be regarded with disfavor. * * *"

Funds in Custodia Legis and Not Held for Unreasonable Periods Do Not Ordinarily Bear Interest Unless Interest Is Earned Upon Such Funds.

The facts have been sufficiently stated. We refer to the following authorities in support of the above heading: *Thomas* v. *Western Car Company,* 149 U. S. 95; *American Iron and Steel Manufacturing Co.* v. *Seaboard Air Line Railway,* 233 U. S. 261; *Chemical National Bank* v. *Armstrong,* 59 Fed. 372 (C. C. A. 6); *Richardson* v. *Louisville Banking Co.* 94 Fed. 442 (C. C. A. 5). See also *Sexton* v. *Dreyfus,* 219 U. S. 339.

There is no contention that the funds in the special bank account drew any interest.

Denial by Equity of the Relief Prayed.

The finance company entered the proceeding by an intervening petition. The money received from collections, there having been no notices of the assignments, would necessarily come into the proceeding, and the receivers became vested with at least legal title to the money. And the intervening petition prayed that *the money* be paid to the finance company. So much for the contention that the finance company did not pray for equitable relief.

There has never been, in this litigation, any contention that under Illinois law a corporation may not contract to pay interest in excess of the so-called statutory rate. Neither court found usury.

All contracts, whatever their subject matter, have always been subject, in a court of equity, to refusal of relief thereunder, in whole or in part, if the relief prayed be unconscionable or if the attitude is unconscientious in respect of the matter concerning which relief is sought.

The present facts speak for themselves:

1. The finance company sought to charge the receivers with large interest after receivership, though extensive work of the receivers, at the expense of general creditors, was necessarily rendered to conserve and to collect the accounts. There was no offer, and no willingness, to share in any respect in this expense.

2. The assertion of interest was of a rate ranging between 20 per cent and 290 per cent. Such a charge was never asserted against Grigsby-Grunow Company. If the possibility of a demand against receivers or a trustee in bankruptcy, with sky-rocketing of interest, was ever contemplated by the finance company, we cannot see that the manner of contract drafting was to its credit. Is a court of equity administering an estate in receivership bound to entertain such an unfair demand? If so, we assume that in the future such a contract, and corporate officers are not always interested in what may happen after receivership or bankruptcy, may lawfully provide that in the event of receivership or bankruptcy the assignee may simply keep all the security. If such were the letter of the contract, what defense even in a court of equity could be interposed, if our opponent's brief be sound doctrine?

3. Attorney's fees of $7,800 were demanded in the trial of a simple issue, involving at the maximum $3,306.55.

National Fire Insurance Co. v. *Thompson,* 281 U. S. 331, 338:

> "Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief."

Miss. & Mo. R. R. v. *Cromwell,* 91 U. S. 643, 645:

> "The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law. This has been so often held on bills for specific performance, and in other analogous cases, that it is unnecessary to spend argument on the subject."

See also *Cragin* v. *Powell,* 128 U. S. 691; *Deweese* v. *Reinhard,* 165 U. S. 386; *Randolph's Administrator* v. *Quidnick Co.,* 135 U. S. 457.

"He who seeks equity must do equity" is a principle as old as equity. Pomeroy's Equity Jurisprudence, 4th Ed., Vol. I, Sec. III; *Williams* v. *Dutton,* 184 Ill. 608, 612, "will not lend its aid to a complainant unless even-handed justice and good conscience demand that relief should be granted;" *Winslow* v. *Noble,* 101 Ill. 194; *Glos* v. *Stuckart,* 277 Ill. 346.

Certainly this general equitable principle is not set aside merely because the contract in issue involves a lending of money.

In re Reed & Furniture Co. 7 F. (2d) 885 (C. C. A. 7, 1925):

> "The later statute may or may not have repealed *pro tanto* the usury law of the state, but it did not abrogate the rule that courts of equity will not lend their aid to enforce contracts which upon their face are so manifestly harsh and oppressive as to shock the conscience."

Irrespective of usury laws, Illinois courts of equity have always refused to enforce lending contracts considered oppressive and unconscionable. *Jenkins* v. *Greenbaum,* 95 Ill. 11; *Higgins* v. *Lansingh,* 154 Ill. 301. See also *Cutting* v. *How,* 8 Mass. 257; *Van Benschooten* v. *Lawson,* 6 Johns. Ch. (N. Y.) 313; 66 Corpus Juris 143. In Illinois, even in courts upon the law side, contracts for compound interest (there is no statutory provision) are held unen-

forcible. *Bowman* v. *Neely,* 137 Ill. 443; *Bowman, admr.* v. *Neely,* 151 Ill. 37.

The Circuit Court of Appeals in the present case said, 72 F. (2d) 471, at 473:

> "But where the creditor goes beyond the practice of the parties under the original contract and tries to enforce rights never asserted against the other contracting party, and in addition tries to collect counsel fees exceeding 177 per cent of the maximum amount claimed against the receiver who is attempting to salvage the assets for the benefit of the other creditors who have a substantial interest in the estate of the debtor, we cannot feel that a court of equity is any place for him to press his demands."

Respectfully submitted,

THOMAS L. MARSHALL,
134 South La Salle Street,
Chicago,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, AS TRUSTEE IN BANKRUPTCY OF GRIGSBY-GRUNOW COMPANY,
Respondent.

MOTION BY RESPONDENT FOR LEAVE TO PRESENT TO THE COURT A STATEMENT ALTERING ANSWER TO A QUESTION DIRECTED BY THE COURT TO COUNSEL FOR RESPONDENT DURING THE ORAL ARGUMENT, FEBRUARY 14, 1935.

THOMAS L. MARSHALL,
134 South La Salle Street,
Chicago,
Counsel for Respondent.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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MOTION BY RESPONDENT FOR LEAVE TO PRESENT TO THE COURT A STATEMENT ALTERING ANSWER TO A QUESTION DIRECTED BY THE COURT TO COUNSEL FOR RESPONDENT DURING THE ORAL ARGUMENT, FEBRUARY 14, 1935.

Now comes Frank M. McKey, trustee, by his counsel, and respectfully asks leave to present to the Court the following statement altering answer to a question directed by the Court to counsel for respondent during the oral argument, February 14, 1935.

Respectfully presented,

THOMAS L. MARSHALL,
134 South LaSalle Street, Chicago,
Counsel for Respondent.

We were asked whether, upon leave of court, the finance company could not have maintained against the receivers an action at law for money had and received.

This question was answered in the affirmative. We wholly omitted, however, to point out the fact, indisputable upon the record, that on November 29, 1933, when the intervening petition was filed by the finance company, *only an inconsequential sum of money had at that time been received* by the receivers from the assigned accounts (R. 24, lines 2-6). The accounts were at that time badly frozen (R. 24.) While the remedy at law of the action for money had and received theoretically existed, it was at that time practically valueless.

The finance company's intervening petition sought, in advance of receipt by the receivers of moneys from the assigned accounts, to obtain a decree to impress in advance a trust. Or expressed in another way, the relief prayed is not unlike the relief prayed in a bill to foreclose a pledge, the liquidation of the accounts standing in lieu of the conventional sale of the collateral.

We quote the last paragraph of the intervening petition (R. 16):

> "Your petitioner further prays the court that an order directing the receivers herein to deliver to your petitioner all moneys, or other evidences of payment, by them collected, or on account of the accounts so assigned to your petitioner, together with any and all evidences of indebtedness received or held by them, arising out of the collection or attempted collection of said accounts, until such time as your petitioner shall have received the amount due to it, together with its reasonable attorney's fees, costs and expenses in this behalf expended, and to that end, if it be found necessary, to order an audit or accounting for the purposes thereof."

The finance company's theoretical remedies therefore were three:

1. With leave of court, to give notices to the debtors of the assigned accounts, and to deal with the collateral without utilizing the receivership. After leave of court had been obtained, the receivers would have had nothing to do with this course of action, unless such a wasteful course had been pursued by the finance company as to have justified injunctional relief to the receivership estate or to the general creditors. The finance company did not wish to pursue, and did not pursue, this course, because it undoubtedly would have resulted in loss to them of principal (R. 24, lines 2-6; R. 71, opinion of District Court, lines 12-27).

2. With leave of court, to sue the receivers at law for money had and received. On November 29, 1933, this remedy was inconsequential, because the accounts were badly frozen, and sums then "had and received" were wholly inconsequential in amount. (References to record, *supra*). This remedy was not pursued. The finance company desired to effect a remedy in advance of receipt of moneys by the receivers, lest the moneys when received be otherwise used by the receivers.

3. The remedy actually pursued.

Respectfully submitted,

THOMAS L. MARSHALL,
134 South LaSalle Street, Chicago,
Attorney for Respondent.